

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTAZ BORDEN,

Defendant-Appellant.

UNPUBLISHED

November 18, 2004

No. 250143

Wayne Circuit Court

LC No. 03-003311-01

Before: Borrello, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of assault with a dangerous weapon (felonious assault), MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to one to four years in prison, concurrently, for each of the felonious assault convictions and to a consecutive term of two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's sole issue on appeal is whether the trial court erred in admitting testimony regarding the theft of glasses that had occurred two days before the shooting. Defendant argues that the trial court abused its discretion in admitting testimony about the prior armed robbery because it amounted to improper character evidence and the prejudicial effect substantially outweighed the probative value. We disagree.

This Court reviews a trial court's decision whether to admit evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion exists when the trial court's ruling is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but the defiance of it. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). When the decision whether to admit evidence involves a preliminary question of law, such as whether a rule of evidence precludes the admission of the evidence, our review of the question of law is de novo, and this Court will find an abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law. *Katt, supra* at 278.

MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may,

however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in this case.

Evidence of other crimes, wrongs, or acts is admissible if: (1) the prosecutor offers it to prove something other than character or propensity, (2) the evidence is relevant under MRE 401-402, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994).

One of the complainants, Calvin Spencer, testified that he believed defendant had taken his glasses. The prosecutor began to ask Spencer about the circumstances of the robbery of the glasses and defense counsel promptly objected, arguing that the testimony would constitute improper bad acts evidence. The trial court overruled the objection and allowed the question. Spencer then testified that, “when I was coming out two guys were dressed in black clothes . . . with hoods on and one pulled a gun on me while the other one snatched [the glasses].” He did not see the men’s faces. The next day, Spencer saw defendant wearing the glasses. The theft of the glasses played a significant role in the unfolding of events that eventually led to the shooting.

The trial court did not abuse its discretion in admitting the testimony regarding the armed robbery of the glasses. First, the prosecutor offered the evidence for a proper purpose. A proper purpose is a non-character purpose; the list of purposes enumerated in MRE 404(b) is not exclusive. *People v Ortiz*, 249 Mich App 297, 305; 642 NW2d 417 (2002), citing *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). The prosecutor articulated proper, non-character purposes for the admission of the testimony, namely, to provide the context of the confrontation that led to the shooting in the present case and to establish Spencer’s credibility.

“[I]t is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place.” *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). The *Sholl* Court relied on *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978), in which the Michigan Supreme Court stated:

It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the “complete story” ordinarily supports the admission of such evidence. [Citations omitted.]

Stated otherwise, evidence of other criminal acts can be admitted by the trial court when the acts are so blended or connected with the crime of which the defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime. *Sholl*, *supra* at 742 (citation omitted).

Here, the evidence was introduced for a proper purpose and was relevant. “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. The relevancy “threshold is minimal: ‘any’ tendency is sufficient probative force.” *People v Crawford*, 458 Mich 376, 390; 582 NW2d 785 (1998). If the proposed evidence is relevant only to the defendant’s character or propensity to commit the crime, the evidence must be excluded. *Knox, supra* at 510.

The trial court found the circumstances of the theft relevant:

As I understand in both of the opening statements reference was made to bad blood or a dispute existing between the Defendant and Mr. Spencer. To me it would appear relevant, at least on its face.

The question delves into what lead [sic] to this dispute of bad blood between Mr. Spencer and the Defendant. . . . It could, perhaps, explain the actions that Mr. Spencer took that caused a reaction by Mr. Borden and it certainly sheds some light on the circumstances.

As the trial court noted, the circumstances involving the robbery of the glasses were made relevant by the opening statements of both the prosecutor and defense counsel. The prosecutor stated, “[t]here’s an argument and accusations involving a pair of glasses. . . . This argument turns life threatening. . . . Mr. Spencer will say that he believes that he holds Mr. Borden responsible for a pair of glasses of his that were snatched from him.” Similarly, defense counsel stated, “I believe that the evidence is going to come out that there was, as [the prosecutor] said, some bad blood because the Spencers believed that my client stole some glasses.”¹ The proposed evidence is relevant to shed light on the circumstances of the offense at issue. *Sholl, supra*. The theft of the glasses caused the bad blood between Spencer and defendant and led directly to the confrontation and shooting two days later.

Also, the prosecutor argued that the evidence was relevant to Spencer’s credibility. This case involved a credibility contest between the complainants and defendant. The testimony regarding the theft of the glasses may have had a tendency to make Spencer’s testimony more credible as it explained both Spencer’s actions in confronting defendant and defendant’s violent reaction. Given the low threshold for relevancy, the evidence regarding the theft of the glasses clearly had relevance “distinct from the impermissible character inference.” *Crawford, supra* at 397.

Next, the probative value of the bad acts evidence was not substantially outweighed by unfair prejudice. The weighing of probative value and unfair prejudice under MRE 403 is best left to a contemporaneous assessment of the presentation, credibility, and effect of the testimony. *People v Magyar*, 250 Mich App 408, 415-416; 648 NW2d 215 (2002), quoting *People v*

¹ It is certainly arguable that defense counsel’s opening statement in fact waived any claim of error regarding the admission of evidence regarding the theft of the glasses. See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Bahoda, 448 Mich 261, 291; 531 NW2d 659 (1995). “Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury. In the context of prior bad acts, that danger is prevalent.” *Crawford, supra* at 398. However, if the prior bad act is not the same as the crime for which the defendant is on trial, the danger of unfair prejudice is greatly lessened. *Ortiz, supra* at 307.

The trial court made a contemporaneous assessment of the presentation, credibility, and effect of the testimony and found that it was not more prejudicial than probative. The trial court could properly conclude that the probative value of Spencer’s testimony was not substantially outweighed by unfair prejudice. It is unlikely that the testimony at issue was given undue or preemptive weight by the jury given that Spencer had already testified that he believed defendant took his glasses and his testimony made clear that he could not identify defendant as one of the robbers of the glasses, much less as the robber that pulled the gun on him. Also, the alleged armed robbery offense is different from the felonious assault in the sense that the felonious assault involved the discharge of a weapon and it was unrelated to any robbery or theft motivation. Although, in this case, the armed robbery and felonious assault offenses both involved firearms, the underlying crimes were sufficiently different such that the jury was unlikely to conclude that, “if he did it before, he probably did it again.” *Ortiz, supra* at 307. Therefore, the jury was unlikely to give undue weight to the testimony or convict defendant based on propensity to commit gun-related offenses. Moreover, and importantly, the probative value of the evidence was significant and weighed heavily in favor of admission in that it provided the jury with the “complete story.”²

We hold that the trial court’s decision to admit the testimony was not an abuse of discretion and Spencer’s testimony was not inadmissible as a matter of law, where the record supports a finding that the testimony (1) was offered to prove something other than character, (2) was relevant, and (3) the probative value was not substantially outweighed by unfair prejudice. *Knox, supra* at 509.

Even if the trial court’s admission of the testimony was erroneous, a preserved, non-constitutional error is not a ground for reversal unless it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Error requires reversal only if it is prejudicial, and the prejudice inquiry focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence. *Crawford, supra* at 399-400 (citation omitted).

Admission of the testimony, even if erroneous, was harmless. As the jury was unlikely to give preemptive weight to the testimony, it is also unlikely that the admission of the testimony was outcome determinative. When considered in light of the other evidence against defendant, the effect of the testimony was harmless. Two of the complainants testified that defendant pulled

² Defendant attempts to draw a distinction between evidence that Spencer blamed defendant for the theft, which defendant admits was relevant and admissible, and evidence of *how* the theft occurred. However, this distinction, if it were observed, would result in the jury hearing piecemeal evidence of the underlying circumstances that ultimately led to the shooting; the jury was entitled to the complete story. *Sholl, supra* at 741-742; *Delgado, supra* at 83.

out an AK-47, loaded the gun, and fired in their direction. The police traced defendant's footprints in the snow to a vacant garage where they found the AK-47. The path created by defendant's footprints did not cross any other path. The footprints matched the soles of defendant's shoes. Given this evidence, the admission of the testimony regarding the theft of the glasses was harmless.

Affirmed.

/s/ Stephen L. Borrello

/s/ William B. Murphy

/s/ Janet T. Neff